SUPREME COURT, U.S.

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In the Supreme Court
OF THE
United States.

OCTOBER TERM, 1952

No. 206

THE COUNTY OF MINERAL, STATE OF NEVADA, a Political Subdivision of the State of Nevada,
Petitioner,

vs.

THE PUELIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and the CALIFORNIA ELECTRIC POWER COMPANY, a Corporation,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.

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2. Company's sales to Mineral County are not sales to a person as defined in the act and, therefore, not subject to regulation under Part II of the act.

3. Company's service to Mineral County is merely a part of its distribution business in Mono County, California, and therefore was subject to regulation under Part II of the act.

Respectfully submitted,

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APPENDIX.

Rate Regulation Provision of Licenses.

Article 23 of Licenses for Projects 1388 and 1390, Article 25 of Project 1389, and Article 28 of Project 1394.

* * *

"The licensee shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged; and in case of the development, transmission, distribution, sale or use of power in public service by the Licensee or by its customers engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by the Licensee or by its customers engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of this license that jurisdiction is hereby conferred upon the Commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control; provided, that the jurisdiction of the Commission shall cease and determine as to each specific matter of regulation and control prescribed in this article as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter."

STATEMENT.

California Electric Power Company is engaged in the business of furnishing electric energy in certain eastern portions of California and also in two counties of Nevada (Gov. R. 7).

Since 1936 the Company has been selling energy to Mineral County at Mill Creek, California (R. 26). The Company delivers the energy in California at the 55 kv station bus at its Mill Creek, California, generating plant. From there, Mineral County transmits the energy over its own 55 kv. transmission line, running partly through California and partly through Nevada, to Mineral County where the County resells the energy to its retail customers.

A large percentage of the energy furnished Mineral County is derived from Company hydroelectric projects located in California but operated under federal license under Part I of the Federal Power Act by virtue of location on public lands or on navigable streams (Gov. R. 11). At times, however, all or a portion of the energy comes from non-licensed sources (Gov. R. 11).

In October, 1947 California Electric Power Company applied to the California Commission for a general increase in electric rates throughout its system. Extensive hearings were conducted. Among other evidence, the revenues and expenses in connection with the sales to Mineral County were considered (Gov. R. 8). On July 1, 1948 the California Commission issued its Decision No. 41798 (48 Cal. P.U.C. 183) authorizing rate increases spread equitably

among the several classes of consumers in accordance with accepted practice (Gov. R. 8). It prescribed Schedule P-3 for customers of the same type and kind as Mineral County, but it did not expressly name the County.

The question soon arose whether such rate decision should be construed to apply to sales to Mineral County, and the Company filed a supplemental application with the California Commission seeking a determination on that point. In the midst of the hearings thereon, the Federal Power Commission issued an order to show cause against the Company upon the theory that it, not the California Commission, had jurisdiction over the sales to Mineral County. By mutual agreement of the two commissions, a concurrent hearing was held to explore the jurisdictional question (Gov. R. 7). The Chairman of the Nevada Public Service Commission stated at the concurrent hearing that his Commission had determined not to participate in the cooperative procedure and that he would appear only as an interested party. He said he would not know what the position of the Nevada Commission would be, until after the matter of jurisdiction had been decided (No. 495, this Term, Tr. of Record 153). Subsequently, each commission rendered its opinion, each finding that it, rather than the other commission, had jurisdiction (California Commission Decision No. 45913, issued July 3, 1951 (Gov. R. 6-19); Federal Commission Opinion No. 212, issued April 13, 1951 (Gov. R. 24)). The Federal Commission opinion had been preceded by a federal hear-

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BRIEF FOR THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.

OPINIONS BELOW.

The decision of the California Public Utilities Commission (Gov. R. 6-19)[1] is reported at 50 Cal.

[1] "Gov. R." refers to the record in No. 205, this Term.

P.U.C. 749. The order of the California Supreme Court denying a petition for writ of review is reported in 38 Adv. Cal. 323 (R. 38) and its order denying rehearing is reported in 38 Adv. Cal. 484 (R. 46). Neither of such orders is accompanied by an opinion.

JURISDICTION.

The California Supreme Court denied a writ of review respecting the decision of the California Public Utilities Commission on January 21, 1952 (R. 38), and denied rehearing on February 18, 1952 (R. 46). The County of Mineral sought and obtained an order extending time for filing a petition for writ of certiorari to July 17, 1952 (order of Mr. Justice Douglas, dated May 1, 1952 (R. 47)). Petition for writ of certiorari was filed July 16, 1952 and was granted October 13, 1952. The jurisdiction of this Court rests upon 28 U.S.C. 1257(3).

QUESTIONS PRESENTED.

The ultimate question is whether the California Public Utilities Commission could, consistently with the Federal Power Act, authorize and direct California Electric Power Company to charge certain rates in selling electricity in California to the Mineral County Power System (the operating name for the County of Mineral, Nevada), Mineral County Power System taking delivery in California and trans-

mitting the energy over its own lines to Nevada for resale to its customers in that state.

More specifically, the principal questions are:

Whether under Part II of the Federal Power Act the Federal Power Commission can claim jurisdiction over the sales to Mineral County even though that Commission's jurisdiction over sales is limited to interstate sales "to any person for resale" and Mineral County is not a "person" as defined "for purposes of this act" in Section 3(4).

Whether, if the conditions to state jurisdiction vouchsafed by Section 20 of Part I are met, that circumstance precludes Federal Power Commission jurisdiction under Part II because of the provision in Section 201(a) that such jurisdiction shall "extend only to those matters which are not subject to regulation by the States."

Whether under Part I the conditions to state jurisdiction contained in Section 20 are met, viz., that the states directly concerned have provided regulatory commissions with authority to enforce the requirements of Section 20 and such states have not been shown "unable to agree" through their properly constituted authorities.

STATUTE INVOLVED.

The pertinent provisions of the Federal Power Act (41 Stat. 1063, as amended by Title II of the Public Utility Act of 1935, 49 Stat. 838, 16 U.S.C. 791a, *et seq.*) are set out in Appendix A, *infra*, pp. 31-39.

in committee reports as proving that Congress meant to cover a situation to which it had given no thought.

Finally, it should be noted that, while the position of petitioner that the identity of purchaser of wholesale power is immaterial has met with approval before three federal courts (*California Electric Power Co. v. Federal Power Commission*, 9th Cir., No. 12987 (1952); *Wisconsin-Michigan Power Co. v. Federal Power Commission*, 197 F. 2d 472 (7th Cir.); *Wisconsin, et al. v. Federal Power Commission* and *Wisconsin Power and Light Co. v. Federal Power Commission*, D.C. Cir. Nos. 11224, 11225); no consideration was given by those courts to the fact that, while there is need for protection in the case of an ultimate consumer who buys from a public utility, there is no such need in the case of an ultimate consumer who purchases from a governmental agency. The policy of Congress as manifested in the Federal Power Act does not extend to this latter situation.

B. Even though the sales to Mineral County do fall within the principle of the Attleboro case and by virtue of the interstate commerce clause are beyond jurisdiction in the absence of a specific grant of authority by Congress, Congress did in fact by the Federal Water Power Act of 1920, incorporated as Part I of the Federal Power Act of 1935, confer upon the states jurisdiction over interstate sales of licensed power provided certain conditions were met, viz., that the states directly concerned had qualified regulatory commissions and that such states were not shown unable to agree respecting the rates in question. Part I, Section 20. It follows that, whenever upon the facts of a given case the conditions to state jurisdiction provided in Section 20 are met, Section 201(a) operates to preclude Federal Power Commission jurisdiction under Part II, inasmuch as Section 201(a) declares that Federal Power Commission jurisdiction shall "extend only to those matters which are not subject to regulation by the States."

This conclusion in the first place follows the natural meaning of the phrase "extend only to those matters which *are not subject to regulation by the States.*" (Sec. 201(a). Emphasis added.) The phrase contains no limitation. It says that, whenever the states have jurisdiction, regardless of the source of that jurisdiction, authority is withheld from the Federal Power Commission. The states may have jurisdiction because the interstate commerce clause does not forbid it. Or the states may have jurisdiction because, while falling under the ban of the interstate commerce clause, Congress has, nevertheless, conferred jurisdiction upon them, as it has power to do. See *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1944). That is precisely what Congress has done in Section 20 of Part I where interstate sales of power by a licensee are involved and the conditions to state jurisdiction set forth in that section are met.

Such literal construction of the phrase "extend only to those matters which are not subject to regulation by the States" is wholly in keeping with the legislative history and the aim of Congress. The committee hearings, the committee reports and the words on the floor of Congress pertaining to Part II are all replete with statements that Part II was designed to fill the gap in regulation revealed by the *Attleboro* decision, *but to do no more,* ensuring to the states whatever authority they were already able to exercise, regardless of the source of that authority. The phrase in question was used with the express purpose of guaranteeing to the states *all* of their previously possessed authority, even that given them by the Federal Water Power Act of 1920, which was incorporated as Part I of the Federal Power Act. It is often forgotten that the Federal Water Power Act of 1920 was in effect when the *Attleboro* decision came down in 1927 but was not involved in that case because the energy in question came from non-licensed sources. Surely, no one can doubt that, if licensed power had been involved, the sales would have been "subject to regulation by the States" assuming the conditions of Section 20 could be met.

The foregoing construction of the phrase "extend only to those matters which are not subject to regulation by the States" has the great merit of making it possible to reconcile the jurisdictional provisions of Parts I and II under all circumstances. The problem of jurisdiction in *Pennsylvania Water Co. v. Federal Power Commission,* 343 U.S. 414 (1952),

ing examiner's decision which coincided with the California Commission's views and denied Federal Commission jurisdiction (No. 495, this Term, Tr. of Record 13-52).

The California Commission Decision No. 45913 was made the subject of petition for writ of review filed by Mineral County before the California Supreme Court. That Court's action denying review (R. 38) constituted a determination upon the merits.

California Public Utilities Code, Sections 1756-1760 (Cal. Stats. 1951 ch. 764; formerly Public Utilities Act, Section 67)

Napa Valley Electric Co. v. Railroad Commission, 251 U.S. 366, 371-373 (1920)

Southern California Edison Co. v. Railroad Commission, 6 Cal. 2d 737, 747 (1936).

Subsequently, the California Supreme Court denied rehearing (R. 46) and the cause was then brought here upon writ of certiorari.

The Federal Commission Opinion No. 212, on the other hand, was made the subject of review before the Court of Appeals for the Ninth Circuit. That Court affirmed the Federal Commission's opinion (*California Electric Power Co. v. Federal Power Commission,* 9th Cir, No. 12987, decided October 14, 1952). Petition for writ of certiorari is now pending before this Court (this Term, No. 495).[2]

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[2]In the foregoing statement, reference has been made not only to the transcript of record before this Court in this proceeding but also to the transcript of record before this Court in the companion proceeding involving sales to the Navy (this Term, No. 205) and in the cognate proceeding No. 495, this Term, (respecting which peti-

SUMMARY OF ARGUMENT.

Both Part I and Part II of the Federal Power Act must be considered in determining whether jurisdiction may properly be exercised by the California Commission over the sales to Mineral County. This Court has now made it clear, contrary to the repeated contentions of the Federal Power Commission, that Part II, enacted in 1935, did not repeal by implication the Federal Water Power Act of 1920, incorporated as Part I of the Federal Power Act in 1935, so to place interstate wholesale sales of licensed power solely under Part II. The sales in *Pennsylvania Water Co. v. Federal Power Commission*, 343 U.S. 414 (1952), were interstate wholesale sales and therefore seemed to fall under Part II; they were also sales of licensed energy and therefore seemed to fall under Part I. This Court specifically declared the sales to be subject to *both* Part I and Part II. 343 U.S. at 419.

A reading of the pertinent portions of the California Commission decision (Gov. R. 10-16) makes clear that such decision was careful to assume that *both* Part I and Part II were relevant in determining jurisdiction. Thus, the California Commission's approach proved to be wholly in accord with the subsequent views expressed by this Court in the *Pennsylvania Water* case.

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tion for writ of certiorari is pending). While we would have questioned the propriety of such course, petitioner has followed it in its brief, and, since there is no dispute respecting the facts, it is doubted whether any harm can come from the loose practice in which the petitioner apparently wishes to indulge.

Specifically, the sales to Mineral County are of energy derived partly from licensed sources. In addition, the petitioner argues that such sales are at wholesale in interstate commerce within the meaning of Part II. Therefore, both Part I and Part II of the Federal Power Act must be examined. It will be expedient to take up Part II first.

Under Part II, the sales to Mineral County are excluded from Federal Power Commission jurisdiction for two separate reasons:

(A) The sales are not to a "person." The wholesale sales in interstate commerce over which the Federal Power Commission is given jurisdiction under Part II are defined as sales "to any person for resale." Part II, Section 201(d). The petitioner would admit that literally "person" as defined in the Act (Section 3(4)) excludes Mineral County. By adoption of the Government's brief in No. 205, it argues that a literal construction would produce a result at odds with the purpose of Congress. However, far from being at odds with the purpose and aim of Congress, the literal construction is entirely consistent. The petitioner's argument contains the fundamental weakness of assuming that purchasers from a governmental agency are in the same position as members of the general public purchasing electricity from a private utility and in need of the same protection. Sensing such weakness, the petitioner shifts its ground to the proposition that it is the seller of power rather than the consumer which Con-

gress aimed to protect and that surely Congress must have intended to give the petitioner as much protection as it gave public utilities. (Gov. Brief 32.) However, the legislative history reveals that Congress was not concerned at all about the welfare of public utilities but only of ultimate consumers. Finally, the petitioner indulges in a specious legislative history argument designed to show that Congress did not know what it was doing when it used "person" in section 201(d). Such argument can readily be disposed of.

(B) Even though the sales to Mineral County do fall within the principle of *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927) and by virtue of the interstate commerce clause are beyond state jurisdiction in the absence of a specific grant of authority by Congress, Congress did in fact by the Federal Water Power Act of 1920, incorporated as Part I of the Federal Power Act in 1935, confer upon the states jurisdiction over interstate sales of licensed power provided certain conditions set forth in Section 20 were met, viz., that the states directly concerned had qualified regulatory commissions and that such states were not shown unable to agree respecting the rates in question. It follows that, whenever upon the facts of a given case the conditions to state jurisdiction provided in Section 20 are met, Section 201(a) operates to preclude Federal Power Commission jurisdiction under Part II, inasmuch as Section 201(a) declares that Federal Power Commission jurisdiction shall "extend only

to those matters which are not subject to regulation by the states."

This conclusion not only follows the natural meaning of the language of Section 201(a), but is impelled by the legislative history and has the great merit of making it possible to reconcile the jurisdictional provisions of Parts I and II under all circumstances.

Turning to Part I, the California Commission is permitted to exercise jurisdiction over the sales to Mineral County because all of the conditions to state jurisdiction set forth in Section 20 are met. State jurisdiction is vouchsafed by Congress over interstate sales by licensees where the states directly concerned have provided commissions to enforce the requirements of the section and where such states are not unable to agree on the rates to be charged.

(A) Even though California and Nevada are both states "directly concerned," each has "provided a commission or other authority to enforce the requirements of this section [20] within such State." Contrary to the petitioner's argument that Section 20 requires state commissions with compact powers, it is clear that Congress contemplated no more than a commission in each state with authority to fix just and reasonable rates "within such State." Both California and Nevada have such commissions.

(B) Even though California and Nevada are both states "directly concerned," they have not been shown unable to agree through their properly constituted authorities respecting the rates which the California

Commission directed California Electric Power Company to charge Mineral County. To circumvent the effect of this admitted fact, the petitioner seeks to have read into Section 20 a requirement which is not there, viz., that the states must enter into affirmative agreements before they can claim jurisdiction to the exclusion of the Federal Power Commission. Actually, Section 20 vouchsafes state jurisdiction so long as there is an absence of disagreement. Nevada upon the facts has not disagreed in any manner respecting the California Commission's authorization of rates for sales to Mineral County.

The argument herein assumes that the sales in question are in interstate commerce because such assumption was made by the California Commission in reaching its decision. Furthermore, and for the same reason, no reliance is placed on Section 201(f) of Part II. The brief of the second respondent, California Electric Power Company, deals with these matters.

ARGUMENT.

I. BOTH PART I AND PART II OF THE FEDERAL POWER ACT MUST BE CONSIDERED IN DETERMINING WHETHER JURISDICTION MAY PROPERLY BE EXERCISED BY THE CALIFORNIA COMMISSION OVER THE SALES TO MINERAL COUNTY.

This Court has now made it clear, contrary to the repeated contentions of the Federal Power Commission, that Part II, enacted in 1935, did not repeal by

implication the Federal Water Power Act of 1920, incorporated as Part I of the Federal Power Act in 1935, so to place interstate wholesale sales of licensed power solely under Part II. The sales in *Pennsylvania Water Co. v. Federal Power Commission*, 343 U.S. 414 (1952), were interstate wholesale sales and therefore seemed to fall under Part II; they were also sales of licensed energy and therefore seemed to fall under Part I. This Court specifically declared the sales to be subject to both Part I and Part II. 343 U.S. at 419.

Even in the face of the *Pennsylvania Water* case, petitioner by adopting the Government's brief in No. 205 argues for repeal by implication. (Gov. Brief 54, 55.) Despite the clear statement that jurisdiction was given under Part I, Section 20, as well as under Part II, over the sales in question, viz., interstate sales for resale of licensed energy, the Government urges, "if the question should be reached in the present case that Section 20 does not extend to interstate sales for resale and that, if this reading be incorrect, that Section 20 is *pro tanto* repealed by implication by Part II of the Act" (Gov. Brief 55n). We submit that the petitioner is unwarranted in treating this Court's statement respecting Part I as dictum. Furthermore, this Court has now made clear that the provisions of Part I must be accorded as much vitality as the provisions in Part II, even to the extent that seemingly overriding provisions of Part II will not be construed as "a repeal by implication of the powers over licensees that are deeply engrained in Part I of the

Act and put there by Congress for the purpose of protecting the public domain." *Federal Power Commission v. Idaho Power Co.*, ... U.S. ....., 97 L. ed. (Advance p. 9, 13).

Contrary to the assertions that the California Commission came to its conclusion upon an erroneous assumption that Part I alone is to be considered when licensed power is involved (Gov. Brief 16, 53), a reading of the pertinent portions of the California Commission's decision (Gov. R. 10-16) makes clear that such decision was careful to assume that *both* Part I and Part II were relevant in determining jurisdiction. Thus, the California Commission's approach proved to be wholly in accord with the subsequent views expressed by this Court in the *Pennsylvania Water* case.

The sales to Mineral County are of energy derived partly from licensed sources. In addition, the petitioner argues that such sales are at wholesale in interstate commerce within the meaning of Part II. Therefore, both Part I and Part II of the Federal Power Act must be examined. It will be expedient to take up Part II first.

II. UNDER PART II THE SALES TO MINERAL COUNTY ARE EXCLUDED FROM FEDERAL POWER COMMISSION JURISDICTION FOR TWO SEPARATE REASONS.

A. The sales are not to a "person."

The wholesale sales in interstate commerce over which the Federal Power Commission is given juris-

diction under Part II are defined as sales "to any person for resale." Part II, Section 201(d).

Even if it be conceded that the sales are "in interstate commerce" within the Act, they are not sales to a "person." At the very time the language of Section 201(d) was adopted, Congress also enacted in the same statute a new subsection defining the word "person." Part I, Section 3(4). Mineral County admits that "person" as thus defined excludes it, inasmuch as Section 3(4) states that " 'person' means an individual or a corporation" and Section 3(3) declares that " 'corp ation' . . . shall not include 'municipalities' as hereinafter defined," "municipality" being defined in Section 3(7) to include ". . . political subdivision of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power."

Petitioner does a number of things to escape the literal meaning of "person" as used in Section 201(d) and as defined in Section 3(4):

(1) Respecting the legislative history, it indulges in an intricate, ill-conceived argument, remarkable only for its ingeniousness (Gov. Brief 40, 41, 43). It elaborately argues that the section defining "person," Section 3(4), which appeared in the original bills before Congress in 1935 (S. 1725, H.R. 5423, 74th Cong., 1st Sess.) must not be construed to extend to Section 201(d) because the language of Section 201(d) as finally enacted and containing the word "person" did not appear in those original bills but, on the contrary,

was inserted later on in the session and that, in any case, Congress, when it did insert the language containing the word "person" in Section 201(d), was not thinking about the definition of the word "person" found in Section 3(4) of the bill because it was only aiming "to close an obvious loophole in another aspect." Such reasoning not only imputes to Congress notable carelessness in draftsmanship but defies the canon of construction that "an omission at the time of enactment, whether careless or calculated, cannot be judicially supplied."[3]

We submit that the legislative history leaves no mistake that "person" as defined in Section 3(4) was meant by Congress to have the same meaning throughout the Act; including Section 201(d).[4] Not only had "person" not been defined at all in the Federal Water Power Act of 1920, but, when the word was defined for the first time in 1935, the Solicitor of the Federal Power Commission, one of the chief draftsmen for the new legislation, expressly stated, "We also used the word 'person' because in the drafting of the act, *and particularly in the new part of the act,* you could use the word 'person' with brevity and it made simplification for drafting" (emphasis added). *Hearings before Committee on Interstate and Foreign Commerce on H.R. 5423,* 74th Cong., 1st Sess. 460 (1935).

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[3]Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Col. L. Rev. 527, 534.

[4]That the petitioner recognizes the dangerous ground on which it treads is manifested by its "caveat" (Gov. Brief 38, 39) that "We do not suggest that either the United States or municipalities are 'persons' or 'corporations' for all purposes under the Federal Power Act."

Furthermore, while the original bill offered in the House (H.R. 5423 74th Cong., 1st Sess.) contained language restricting the effect of the definition section, such restriction was left out in the final Act. The original proposal was that Section 3 should start, "For the purposes of this Act, *unless the context otherwise requires* . . ." (emphasis added). When questioned about the situations where the context *would* otherwise require, the Solicitor for the Federal Power Commission said he would study the matter and report back. He subsequently reported that there were no situations where the context would "otherwise require." *Hearings before Committee on Interstate and Foreign Commerce on H.R. 5423*, 74th Cong., 1st Sess. 459, 460, 485. The clause "unless the context otherwise requires" was significantly omitted from the Act as passed.

We recognize that petitioner will be quick to apply to the above facts in the legislative history the same kind of intricate argument as that earlier alluded to and will contend that statements made by the Solicitor must not be given weight because "person" was inserted in Section 201(d) only toward the close of the session. Again, such argument would improperly impute to Congress reprehensible carelessness in draftsmanship.

(2) The petitioner next indulges in a policy argument designed to show that, regardless of the literal meaning of Section 201(d), Congress did not mean to exclude the sales to Mineral County. (Gov. Brief 31-40.) The petitioner very properly observes that

a literal construction of a statute must give way if the result would be plainly at variance with the policy of the legislation as a whole. It develops this thesis with erudition and a wealth of citation.

We submit, however, that not only does the legislative history forbid "person" to be construed as one thing in Section 201(d) and something else in the rest of the Act, but that the aims and policies of Congress are fully carried out by giving "person" in Section 201(d) the meaning which Congress has declared it is to have "for purposes of this act" in Section 3(4).

The hearings before the respective committees of Congress, the reports of those committees and the words on the floor of Congress are replete with expressions of the aim of Congress to fill the gap in state regulation revealed in *Public Utilities Commission v. Attleboro Co.*, 273 U.S. 83, and thereby to protect those members of the general public from excessive rates who are ultimate consumers purchasing electricity from a public utility which, in turn, purchases the energy at wholesale in interstate commerce. E.g., *Hearings before Committee on Interstate and Foreign Commerce on H.R. 5423*, 74th Cong., 1st Sess. 497 (1935); *Hearings before Committee on Interstate Commerce on S. 1725*, 74th Cong., 1st Sess. 250 (1935); Sen. Rep. No. 621, 74th Cong., 1st Sess. 48, 49 (1935); H.R. Rep. No. 1318, 74th Cong., 1st Sess. 7, 8 (1935). Such purpose has been frequently noted by this Court. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 610;

Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, 332 U.S. 507, 514-521; *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329, 335-336.

Purchasers from a governmental agency are not in the same position as members of the general public who are ultimate consumers purchasing electricity from a public utility which, in turn, purchases the energy at wholesale in interstate commerce. The difference in position is very real. The petitioner attempts to obfuscate it by a hurried shift to the specious ground that Congress intended to protect public utilities and governmental agencies alike in selling to ultimate consumers. (Gov. Brief 32.) Certainly, Congress was not concerned with protecting public utilities when it enacted the Federal Power Act.

The vital difference between purchasers from a governmental agency and those members of the public whom Congress *did* intend to protect is that purchasers from a governmental agency are not in need of protection. There is a close similarity of interest between a governmental agency and its purchasers. Mineral County itself is in an entirely different category from a public utility engaged in the business of selling to ultimate consumers. Unlike public utilities which might be willing, and, indeed, have shown themselves willing in the past, to purchase wholesale power in interstate commerce at exorbitant costs so long as they could pass such costs on to ultimate consumers, Mineral County has the public duty of entering into electric purchase contracts only if they are consistent

with its obligations as a political subdivision of Nevada. It follows that in the case of purchasers from the County the very factor is absent which motivated the Congressional policy given expression in the Federal Power Act.

Admittedly, as the petitioner points out, the committee reports of Congress (Sen. Rep. No. 621, H.R. Rep. No. 1318, H.R. Rep. No. 1903, 74th Cong., 1st Sess.) speak in general terms about wholesale sales in interstate commerce without reference to the identity of the purchaser, as being the sales meant to be covered by Part II, but surely the petitioner would have to agree that such general language must be understood in its context which expressly dealt with the *Attleboro* situation, to repeat, a situation where protection is needed for members of the general public who are ultimate consumers purchasing electricity from a public utility[5] which, in turn, purchases the energy at wholesale in interstate commerce. The transcripts of Congressional committee hearings, the reports of those committees and the record of the comments on the floor of Congress in 1935 in connection with the Federal Power Act can all be searched in vain for any reference to the kind of sales here in issue. Clearly, the instant case is, as the petitioner puts it, a situation unforeseen. Therefore, the petitioner is not entitled to rely upon the broad language

[5]Even private individuals or organizations in providing electric service to their tenants have by the great weight of authority been held to be not engaged in the business of public utility service. E.g., *Stopy v. Richardson*, 186 Cal. 162, 198 Pac. 1057 (1921); *Jonas v. Swetland*, 119 Ohio St. 12, 162 N.E. 45, PUR 1928D 825 (1928); *In Re Fulton*, PUR 1930D 11 (Mo. 1930).

SEC. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service,

or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

* * * * * * *

SEC. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

* * * * * * *

SEC. 306. Any person, State, municipality, or State commission complaining of anything done or omitted to be done by any licensee or public utility in contravention of the provisions of this Act may apply to the Commission by petition

happened to be easy because Part I and Part II taken separately both produced the same result that jurisdiction vested in the federal agency. But, suppose the states had *not* been shown "unable to agree". Then Part I, Section 20, standing alone would have operated to vest jurisdiction in the states and Part II standing alone and without reference to the language in Section 201(a) would have operated to vest jurisdiction in the Federal Power Commission. However, by giving Section 201(a) the vitality which Congress meant it to have, the conflict is resolved. The sales would be "subject to regulation by the States" because of Part I, Section 20; therefore, Section 201(a) would operate to deny jurisdiction to the Federal Power Commission under Part II.

Upon the facts in the instant case, the conditions to state jurisdiction set forth in Part I, Section 20, are in fact met, as shown in the following section of this brief.

III. UNDER PART I, DEALING WITH SALES OF ENERGY BY LICENSEES OF FEDERAL POWER PROJECTS, THE CALIFORNIA COMMISSION HAS JURISDICTION OVER THE SALES TO MINERAL COUNTY BECAUSE ALL OF THE CONDITIONS TO STATE JURISDICTION SET FORTH IN SECTION 20 ARE MET.

Conceding that the sales to Mineral County are in interstate commerce, then, under Section 20, Congress has conferred jurisdiction upon the Federal Power Commission only if: (a) "any of the States directly concerned has not provided a commission or other

authority to enforce the requirements of this section [20] within such State" and (b) even though the requisite state commissions or other authorities have been provided, only if the states "directly concerned" are "unable to agree" on the service or rates through their properly constituted authorities.

A. Even though California and Nevada are both states "directly concerned," each has "provided a commission or other authority to enforce the requirements of this section [20] within such State."

The California Public Utilities Commission is vested by the California Constitution, article XII, section 23, and by the Public Utilities Act (Public Utilities Code, Sections 451, 453, 454 (Cal. Stats. 1951, ch. 764)) with broad regulatory powers over the rates of public utility electric companies operating within the state.

Similarly, the Nevada Public Service Commission is vested with authority to regulate the rates of public utility electric companies providing service to ultimate consumers in Nevada. Hillyer's Compiled Nevada Laws, 1929, Sections 6100-6146.

We submit that such state commission regulatory control is all that Section 20 contemplates when it speaks of "a commission or authority to enforce the requirements of this section within such State." The context reveals that the "requirements of this section" are that "the rates . . . and the services . . . by any . . . licensee . . . or by any person, corporation, or association purchasing power from such licensee for

sale and distribution or use in public service shall be reasonable . . . to the customer." The section contemplates state commissions of the usual kind with authority to fix rates within their own respective states. This is evident from the quoted language which contemplates that one state shall have regulatory power over the licensee and the other state regulatory power over the purchaser from the licensee. It is further evident from use of the phrase "the requirements of this section within such State."

To counter the foregoing conclusion, the petitioner simply reads into Section 20 what is not there. It declares that to qualify under Section 20 a state commission must have affirmative power to agree on a rate fixed in another state. (Gov. Brief 58-62.) It refers to the *First* and *Second Safe Harbor Cases* (*Safe Harbor W. P. Corp. v. Federal Power Commission,* 124 F. 2d 800 (3d Cir.) certiorari denied, 316 U.S. 663; *Safe Harbor W. P. Corp. v. Federal Power Commission,* 179 F. 2d 179 (3d Cir.) certiorari denied 339 U.S. 957) which did in fact involve state commissions with power to enter into agreements with other state commissions. While it is true that in the *Second Safe Harbor Case* the court indicated a belief that Section 20 contemplated state commissions with compact powers, the fact remains that no affirmative action between the two state commissions took place and yet the court declared they had been shown "unable to agree" under the terms of Section 20, by virtue of certain correspondence by one of the commissions, directed not to the other commission but to

the Federal Power Commission. 179 F 2d 179, 189-193.

We submit that, had Congress, when it first used the language of Section 20 in the Federal Water Power Act of 1920, meant to encompass within its terms only state regulatory bodies having compact powers, it would have done so in direct terms. The unusual grant of compact authority is not lightly to be presumed as having been conferred by indirection, especially since the policy of Congress expressed in Section 20 can be effectuated without any such interpolation. The policy was to ensure that "the rates . . . and the services . . . by any licensee . . . or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable." The state where the licensed power is first sold can ensure the reasonableness of the rate by having a commission with authority to fix the wholesale rate. California has admitted power not only over retail but wholesale rates of utilities operating within the state.[6] The state where the licensed power is ultimately consumed can ensure the reasonableness of "the rates . . . by any person, corporation, or association purchasing

[6]California Public Utilities Code (Cal. Stats. 1951, ch. 764) provides in Section 216(c): "When any person or corporation performs any service or delivers any commodity to any person, private corporation, municipality or other political subdivision of the State, which in turn either directly or indirectly, mediately or immediately, performs such service or delivers such commodity to or for the public or some portion thereof, such person or corporation is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part."

power from such licensee for sale and distribution or use in public service" if it provides a commission with authority to fix such rates,[7] and if it is given the indirect control over the wholesale rate vouchsafed by Section 20, viz., the power to have jurisdiction over that rate automatically transferred to the Federal Power Commission merely by stating its disagreement with such rate. That was in fact the manner by which Federal Power Commission jurisdiction was obtained in the *Second Safe Harbor Case*, and no one can deny that the consumers in Maryland, the state of ultimate consumption, were thereby protected.

B. California and Nevada have not been shown "unable to agree through their properly constituted authorities" respecting the rates which the California Commission directed California Electric Power Company to charge Mineral County.

The petitioner no doubt concedes that this is true upon the facts. Therefore, it reads into Section 20 a requirement that states directly concerned must affirmatively agree upon a given rate in order to obtain jurisdiction over interstate sales by licensees. (Gov. Brief 62.) However, as we have already shown, Section 20 does not envisage state commissions with

[7] The Nevada Public Service Commission has jurisdiction over the rates charged by utilities to ultimate consumers in Nevada. Hillyer's Compiled Nevada Laws, 1929, Section 6116. It also has jurisdiction over the rates charged by Mineral County to its customers. Nev. Stats. 1925, p. 55, Section 16.

The petitioner points out that the Nevada Public Service Commission has no authority over wholesalers of electric power in Nevada (Gov. Brief 59n), but that circumstance is immaterial upon the facts, the wholesale sales having occurred not in Nevada but in California.

compact powers nor any complicated machinery before Federal Power Commission jurisdiction may be invoked. The section envisages state commissions of the usual kind with local, not extraterritorial powers, and a mere inability by the state of consumption to agree with the wholesale rate imposed by the other state is sufficient to invoke Federal Power Commission jurisdiction. As already noted, Federal Power Commission jurisdiction was invoked by this simple means in the *Second Safe Harbor Case*. No complicated compact machinery was contemplated by Congress, nor was any needed to effectuate its policy.

CONCLUSION.

The foregoing analysis clearly demonstrates that in the instant case neither Part I nor Part II conferred jurisdiction upon the Federal Power Commission. Such analysis further demonstrates that the California Commission is not precluded from exercising jurisdiction by Part II, and that Part I authorized the California Commission to exercise jurisdiction.

This is a case where the eloquent admonition of Mr. Justice Frankfurter is particularly applicable:

> "The underlying assumptions of our dual form of government and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits, cut across what might otherwise be the implied range of legislation. The history of Congressional legislation regulating not only interstate commerce as such

but also activities intertwined with it, justify the generalization that, when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those entrusted with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.'"[8]

It is respectfully submitted that the order of the Supreme Court of the State of California, affirming the order of the California Commission, should be affirmed.

Dated, San Francisco, California,
January 2, 1953.

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[8]Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Col. L. Rev. 527, 540.

(Appendix A Follows.)

Appendix A

The pertinent provisions of the Federal Power Act (Title II of the Public Utility Act of 1935, c. 687, 49 Stat. 838, 16 U.S.C. 791a *et seq.*) are as follows:

SEC. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

* * * * * * *

(3) "corporation" means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined;

(4) "person" means an individual or a corporation;

* * * * * * *

(7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

* * * * * * *

SEC. 19. That as a condition of the license, every licensee hereunder which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates

and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee hereunder or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: *Provided,* That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter.

SEC. 20. That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and

distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State * * * or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, * * * jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce * * *.

SEC. 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interest commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy

at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any

one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

SEC. 202. * * *

(b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided,* That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

* * * * * * *

which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such licensee or public utility, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such licensee or public utility shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating such complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall find proper.

* * * * * * *

SEC. 313 (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission

in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. * * *